Supreme Court, U.S.
FILED
NOV 12 1993
OFFICE OF THE CLERK

NO. 93-583

In the
Supreme Court of the United States
October Term, 1993

DiCARLO CONSTRUCTION COMPANY, and
DELTA EQUIPMENT COMPANY,

Petitioners,

v.

H.H. ROBERTSON CO.,
CUPPLES PRODUCTS DIVISION,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the district court properly assert jurisdiction over petitioners to subject them to execution on the judgment against the defendant in this case when (i) petitioners were summoned into the proceedings below pursuant to the traditional equitable remedy available under Missouri law of a creditor's bill in equity, (ii) petitioners were served with process by the United States Marshal, (iii) petitioners were afforded ample opportunity to respond to the claims against them, and (iv) the district court found as a matter of fact that petitioners were the alter egos of the defendant, which routinely disregarded their alleged separateness, engaged in numerous sham transactions, and conspired to defraud respondent from collecting its judgment?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the case fails to recite any of the facts upon which the district court relied in piercing the corporate

veil and permitting respondent to enforce the judgment against petitioners. It also neglects to describe fully the traditional equitable procedure by which petitioners were subjected to enforcement of the judgment. It further overlooks the fact that petitioners were accorded due process, including service of process, notice of the proceeding, and an opportunity to participate in the proceeding. Accordingly, we will briefly recite the facts necessary to place the petition in proper perspective.

Respondent is H.H. Robertson Company, Cupples Products Division ("Cupples").[1/] Cupples obtained a subcontract in 1986 to supply and install the curtain wall (*i.e.*, the exterior facing) for an office building in Kansas City called Two Pershing Square. The subcontract was with defendant V.S. DiCarlo General Contractors, Inc. ("Old DiCarlo"), which acted as the general contractor for Two Pershing Square, although it had no contract at all with the project owner. Unbeknownst to Cupples, the owner's contract was with a related company, petitioner DiCarlo Construction Company ("New DiCarlo"). A third related company, petitioner Delta Equipment Company ("Delta"), purported to supply equipment to Old DiCarlo and New DiCarlo on the project.

After Cupples completed the work required under its subcontract, Old DiCarlo refused to pay the final contract retention. Cupples filed suit against Old DiCarlo in the district court, and Old DiCarlo counterclaimed for alleged delay damages. The jury returned verdicts for Cupples on its claims and on the counterclaim, and the district court entered judgment against Old DiCarlo (Pet. App. 1-2).

1/ Pursuant to Supreme Court Rule 29.1, respondent states that it has merged with the Ceco Corp. and is now known as Robertson-Ceco Corp. It has no parent corporation or subsidiary corporations that are not wholly owned.

Old DiCarlo appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed the judgment on the principal count and reversed and remanded on a second, minor count. *See* 950 F.2d 572 (8th Cir. 1991). Cupples subsequently dismissed the remanded claim. Old DiCarlo did not seek this Court's review of the judgment as modified by the court of appeals.

During that first appeal, Old DiCarlo failed to post a supersedeas bond. Consequently, Cupples attempted for two years to execute on the judgment. Cupples caused the issuance of the numerous writs of execution, garnishments, and charging orders. It also seized and sold property belonging to Old DiCarlo. All these efforts resulted in the collection of less than one percent of the judgment. In response to post-judgment discovery, Old DiCarlo claimed that it had no further assets subject to execution.

Once Cupples had exhausted the legal means of execution available to it against Old DiCarlo, it commenced proceedings in the district court to permit it to enforce the judgment against the two alter ego companies of Old DiCarlo, *i.e.*, the present petitioners, New DiCarlo and Delta. Cupples elected to take advantage of a highly flexible equitable remedy available under Missouri law called a creditor's bill in equity, which was applicable in the district court under Fed. R. Civ. P. 69. *See, e.g., United States ex rel. Goldman v. Merideth*, 596 F.2d 1353, 1357 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979).

Cupples filed its motion for a creditor's bill in equity on July 1, 1991 (Pet. App. 3-5), together with a detailed memorandum of law and extensive evidentiary support. The motion, memorandum, and evidentiary support were served on counsel for Old DiCarlo, New DiCarlo, and Delta (*Id.* at 4-5).

Old DiCarlo filed a motion to dismiss the creditor's bill proceeding on August 21, 1991, observing that "a creditor's bill is considered the equitable equivalent of garnishment or execution" (*Id.* at 12). Old DiCarlo argued that, in prior cases, "plaintiff joined the alleged alter egos as garnishees and was allowed to proceed against them as such in equity under a creditor's bill" (*Id.* at 13).

Cupples then caused New DiCarlo and Delta to be served by the United States Marshal with garnishment summonses and interrogatories to join them formally as parties to the equitable execution proceeding (*Id.* at 17-20). Cupples also filed memoranda expressly stating that the purpose of the garnishments was to add New DiCarlo and Delta as parties to the creditor's bill proceeding and that the purpose of that proceeding was to hold them subject to execution on the judgment as the alter egos of Old DiCarlo. These memoranda were served on all five counsel who at various times had represented Old DiCarlo, New DiCarlo, and Delta in the post-judgment proceedings.

New DiCarlo and Delta filed answers to the garnishment interrogatories on October 2, 1991, denying that they held any assets of Old DiCarlo subject to execution on the judgment (*Id.* at 21-28). Cupples then filed another memorandum with the district court to demonstrate that the procedural aspects of the motion for a creditor's bill had been satisfied since the court could treat the previously filed motion for a creditor's bill as taking issue with the denials in the garnishment interrogatory answers, if that were considered necessary, under Missouri garnishment procedure. This memorandum, which was again served on all five lawyers who had represented Old DiCarlo, New DiCarlo, and Delta, clearly advised all these parties that New DiCarlo and Delta needed to respond to the creditor's bill motion.

The district court granted the motion for a creditor's bill, pierced the corporate veil, and held New DiCarlo and Delta subject to execution on the judgment against Old DiCarlo in an order and memorandum dated April 15, 1992 (*Id.* at 29-35). It also denied Old DiCarlo's motion to dismiss.

The district court found as a fact that "DiCarlo, New DiCarlo, and Delta represent almost indistinguishable corporate entities as evidenced by their sharing the same corporate ownership, office, employees, equipment, business records and financial statements" (*Id.* at 34). The court further found: "DiCarlo is a subterfuge and the alter ego of New DiCarlo and Delta. This is evidenced by the DiCarlo family's exercising complete control over DiCarlo, New DiCarlo and Delta and causing the transfer of substantially all of DiCarlo's assets, employees and contracts to these two corporations without consideration" (*id.*). Furthermore, the court found that "DiCarlo was undercapitalized and unable to meet the financial obligation owing under the subcontract with Cupples" (*Id.* at 34-35). Consequently, the court concluded "that DiCarlo used the alleged separateness of New DiCarlo and Delta as a subterfuge to defraud Cupples from collecting on its judgment" (*Id.* at 35).

Once the district court entered its order piercing the corporate veil, Cupples commenced execution proceedings against the assets of New DiCarlo and Delta on April 21, 1992. Old DiCarlo filed a motion to vacate the district court's order, and New DiCarlo filed a motion to quash the execution. Delta did not file any motion.

The district court considered the motions filed by Old DiCarlo and New DiCarlo on their merits and denied both of them in a memorandum and order dated May 11, 1992 (*Id.* at 54-56). Having considered New DiCarlo's motion to quash on its merits and having concluded that New DiCarlo and Delta had already

been made parties to the execution proceedings, the district court further denied New DiCarlo's motion to intervene as moot (*Id.* at 56).

New DiCarlo and Delta appealed the district court's orders to the Eighth Circuit on June 6, 1992. This time, they posted a supersedeas bond. The court of appeals affirmed the orders of the district court in an opinion reported at 994 F.2d 476 (8th Cir. 1993) (Pet. App. 74-79). It ruled that the district court possessed jurisdiction over New DiCarlo and Delta because Cupples adhered to the procedures required under the Missouri cases relating to the traditional equitable remedy of the creditor's bill (*Id.* at 77-78). The court of appeals also ruled that due process was satisfied because New DiCarlo and Delta had sufficient notice of the nature of the proceedings against them and "had an ample opportunity to fully present their defenses before the [district] court's April 15, 1992 order" (*Id.* at 79). The Eighth Circuit further denied New DiCarlo and Delta's petition for rehearing on July 13, 1993.

New DiCarlo and Delta applied to the Eighth Circuit for a stay of its mandate pending their application for certiorari, but the court of appeals denied that motion and issued its mandate on July 20, 1993. New DiCarlo and Delta the applied to this Court for a stay pending review on certiorari, but Justice Blackmun denied that application on July 26, 1993.

Cupples commenced proceedings in the district court to enforce the judgment against the surety on the supersedeas bond, but New DiCarlo and Delta instead paid the judgment themselves. The parties filed a satisfaction of judgment in the district court on August 26, 1993.

REASONS WHY THE WRIT SHOULD BE DENIED

The issue which petitioners ask this Court to examine is not presented by this case. Contrary to the assertion of the petition, the court of appeals never stated that procedural due process was irrelevant to post-judgment collection proceedings. Rather, the court of appeals held that petitioners had received due process since the district court followed a traditional equitable post-judgment remedy available under Missouri law and afforded petitioners ample notice and opportunity to present their defenses. In addition, this case presents no conflict among the circuits and no question of general importance, and it turns entirely upon its peculiar facts.

I. The Issue of the Applicability *Vel Non* of Procedural Due Process Requirements to Post-Judgment Collection Proceedings is Not Presented in this Case Because the Court of Appeals Never Held that Due Process was Inapplicable; It Actually Held that Due Process Had Been Satisfied.

Petitioners have asked the Court to grant certiorari in this case in order to overrule this Court's prior decision in *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285 (1924). However, neither the district court nor the court of appeals relied upon or even cited *Endicott-Johnson*. In fact, petitioners did not cite *Endicott-Johnson* in their opening brief, reply brief, or petition for rehearing in the court of appeals. The *Endicott-Johnson* decision is, therefore, entirely irrelevant to the opinion below. Under Supreme Court Rule 15, Cupples must advise the Court that this issue would not be presented for its review if certiorari were granted.

Petitioners are plainly incorrect in their assertion that "this case squarely presents the issue of whether a state's equitable post-judgement collection procedure may contain no due process safeguards, ..." (Pet. 7). The reason the court of appeals never cited *Endicott-Johnson* was that the court never suggested that due process requirements were inapplicable. Instead, the court of appeals held that the district court's proceedings fully complied with due process because petitioners had received clear notice of the nature of the claims against them and had been afforded ample opportunity to respond to those claims.

Petitioners made two arguments in the court of appeals. First, they contended that the district court lacked jurisdiction over them because they had not been made parties prior to the judgment against Old DiCarlo. Second, they asserted that they had received insufficient notice of the creditor's bill proceeding and had no opportunity to contest it.

As to the first argument, the court of appeals correctly held that Missouri law recognizes the traditional equitable remedy of a creditor's bill, and the creditor's bill procedure specifically authorized Cupples to initiate the creditor's bill proceeding by post-judgment motion in the original lawsuit and to join the alter ego corporations as garnishees in that proceeding. *United States ex rel. Goldman v. Meredith*, 596 F.2d 1353, 1357 (8th Cir.), *cert. denied*, 444 U.S. 838 (1979); *Shockley v. Harry Sander Realty Co.*, 771 S.W.2d 922, 925 (Mo. App. 1989); *see also Shockley v. Sander*, 720 S.W.2d 418 (Mo. App. 1986).

In this connection, the court of appeals observed (Pet. App. 78) that the cases cited by petitioners in support of their contention that they should have been added as parties *before* the judgment were irrelevant because they failed to discuss the considerable body of case law allowing the joinder of such alter ego corporations as garnishees in post-judgment proceedings such

as the creditor's bill. The court never suggested that due process concerns did not apply in such proceedings.

With regard to petitioners' second argument, the district court and the court of appeals found as a fact that petitioners had sufficient notice because they were named as garnishees on the creditor's bill, served with garnishee summonses, answered the garnishment interrogatories, received all of the relevant pleadings, and had an ample opportunity to present their defenses before the district court's order piercing the corporate veil (Pet. App. 55, 78-79). Contrary to petitioners' assertion (Pet. 10-11), the court of appeals never held that notice was sufficient "because Cupples mailed the garnishment interrogatories to counsel" for petitioners. Instead, the Eighth Circuit concluded that petitioners had been made parties to the post-judgment proceedings when the United States Marshal served them — not their counsel — with process, including garnishment summonses as well as the interrogatories.

Petitioners also misstate the record when they assert several times that they were "never named as parties or served with process" in the creditor's bill proceeding (*e.g.*, Pet. 8). They were named as garnishees in the motion and related pleadings and served with summonses by the United States Marshal. The very Missouri cases cited in the petition make clear that joining such additional parties as garnishees is the proper procedure to subject them to the creditor's bill proceeding. *Shockley v. Harry Sander Realty Co.*, 771 S.W.2d 922 (Mo. App. 1989); *Peerless Industries, Inc. v. Estes*, 779 S.W.2d 332 (Mo. App. 1989). This procedure is perfectly consistent with due process. The district court found, for example, that this procedure represented the very hypothetical situation suggested by this Court for asserting jurisdiction over alter ego corporations in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 111 (1969). *See* Pet. App. 55.

Finally, the argument, based on *Martin v. Wilks*, 490 U.S. 755 (1989), that the court of appeals suggested that petitioners should have voluntarily intervened in the action is nonsense. Petitioners eventually did move to intervene, and the district court *denied* that motion as moot. The court of appeals affirmed the district court's view that petitioners had already been made parties by the U.S. Marshal's service of the garnishment summonses and their appearance in the case through counsel in response to those summonses.

II. This Case Presents No Conflict Among the Circuits and No Question of General Importance, Turns Entirely Upon Its Own Facts, and May Be Moot.

Petitioners cite four decisions from the First, Second, Third, and Tenth Circuits which address whether federal due process protections should be applied in post-judgment collections proceedings (Pet. 5-6). As we have demonstrated above, however, the Eighth Circuit's decision here assumed that due process applied and held that it was satisfied. Therefore, there is no inter-circuit conflict for this Court to resolve.

There is, likewise, no question of general importance in this case. The merits of the dispute were resolved on a prior appeal and are not presented for review here. This case is now nothing but a collection action. Under Fed. R. Civ. P. 69, the district court applied Missouri state procedures on enforcement of judgments. The creditor's bill proceeding presents only obscure questions of Missouri equity procedure. It would be a waste of this Court's resources to grant certiorari simply to construe, as petitioners desire (Pet. 10), the requirement of garnishment exceptions under Missouri Rule 90.13. In any event, that rule does not strictly apply since the proceedings below were not an

ordinary garnishment at law but rather an equitable creditor's bill, part of which required summoning petitioners as garnishees.

Granting certiorari would also be inappropriate because this Court would have to address whether this case has become moot on appeal. Voluntary payment of a judgment ordinarily renders an appeal from that judgment moot. *Railroad Co. v. Commissioners*, 98 U.S. 541, 543-44 (1879); *see also Cahill v. New York, N.H. &* H.R. Co., 351 U.S. 183, 190 (1956) (Black, J., dissenting). Although Cupples had filed a motion to enforce the liability of the surety on the supersedeas bond, no execution of any kind was outstanding against petitioners when they paid the judgment. Thus, this Court might have to conclude that petitioners paid the judgment voluntarily and not under duress, thereby rendering the petition moot.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

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November 12, 1993